Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Annual Assessment of the Status of Competition in the Market for the Delivery Of Video Programming	)	MB Docket No. 16-247

COMMENTS OF
THE FREE STATE FOUNDATION[*]

I. Introduction and Summary

These comments are submitted in response to the Commission's request for comments regarding Section 628(g)'s requirement that the Commission report annually on "the status of competition in the market for the delivery of video programming." The focus of these comments is on the need for the Commission to further Section 628(g)'s underlying purpose by bringing its regulatory policies into alignment with the actual state of competition in the video services market. Further, these comments demonstrate that the Commission's proposed regulations for video devices and video apps are unjustifiable and counterproductive in light of today's competitive market conditions. If adopted, the new navigation device proposal would undermine market values for copyrighted video content and give government ultimate control over video app designs and functions. The Commission must drop this regulatory proposal.

There is clear and convincing evidence demonstrating that today's video market is "effectively competitive." Indeed, the Commission already has determined in its April 2015 *Effective Competition Order* that the multichannel video distributor market is presumptively

[*] These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

competitive on a nation-wide basis and is presently defending that determination in court. Obviously, the Commission should declare this to be the case in its upcoming *Eighteenth Video Competition Report*. As of year-end 2014, direct broadcast satellite (DBS) providers' market share of multi-channel video programming distributors (MVPDs) subscribers rose to 33.8%. "Telco" MVPDs increased their market share to 13% and their nationwide footprint grew by 5%. Broadband service providers such as Google Fiber also expanded their footprints. Meanwhile, cable operators' market share fell to 52.8% of MVPD subscribers.

Online video distributor (OVD) services continue to grow in popularity with consumers. Netflix now has 47 million or more subscribers in the U.S., Amazon Prime has close to 60 million, and Hulu has close to 12 million. By contrast, cable MVPD subscriptions dropped to 53.7 million households in 2014.

On average, U.S. households with broadband connections used 7.3 Internet-connected devices for video in 2014. Those devices included game consoles such as the Xbox One and Playstation 4, streaming media devices like Roku and TiVo, Internet-connected Smart TVs and Blu-ray players, as well as home computers. Cable, DBS, and telco MVPDs offer consumers devices that are unique to their own video networks, such as the Comcast X1 DVR set-top box, DIRECTV's HR 44 Genie Server, and Charter's Worldbox. Consumers can also purchase CableCARD-enabled devices manufactured by third parties from retail outlets. The market is moving toward apps-based viewing, with MVPDs increasingly making content available through proprietary video apps.

With these innovative and competitive developments in the video services market, it does not reflect well on the Commission that analog-era regulations, based on early-1990's perceptions about cable "bottlenecks," remain in force. The analytical underpinnings of those

regulations have been swept away by dynamic marketplace changes. Unnecessary, backward-looking regulation offers little or no benefit to consumers. Instead, overregulation imposes costs on providers that inevitably are passed onto consumers in the form of higher prices or reduced choices. Legacy regulations now impede the competitiveness of MVPD services in a market landscape that is being transformed by convergence on digital and IP-based technologies, cross-platform competition among MVPDs, disruptive OVD services, as well as digital streaming media devices and portable viewing.

In its *Effective Competition Order* (2015), the Commission examined market evidence and adopted a presumption that local markets for multichannel video programming are effectively competitive. For the sake of some semblance of intellectual consistency, the next report should likewise acknowledge that the nationwide cable market is effectively competitive. Dynamic market conditions should prompt the Commission to remove old analog-era regulations – or at least reorient such regulations in a deregulatory direction that will better enhance video competition and consumer welfare.

First Amendment considerations bolster the policy imperative of matching policy to video market reality. Several early 1990s MVPD regulations override provider editorial decisions, restricting free speech. In critical respects, must-carry, must-buy, program carriage, leased access, and other forced access regulations effectively dictate what video service providers must say. But today there are no identifiable market power concerns or perceivable distributional bottlenecks in the video market. Instead, there is effective competition between MVPDs, OVDs, and even wireless providers. The Commission should eliminate speech-restricting regulations where it has the power to do so. And when it lacks such power, the Commission should readjust regulations in a deregulatory direction that respects free speech principles.

Broadcast exclusivity regulation constitutes one candidate for repeal. The Commission should proactively seek other unnecessary and costly legacy rules to wipe from the books. For those instances where repeal of legacy rules requires Congressional action, the Commission should reorient such rules through the use of deregulatory presumptions. The Commission should make free market competition the default presumption in applying its rules. It should require evidence of actual or potential market power or consumer harm to overcome that presumption and thereby justify regulatory intervention. Use of deregulatory presumptions would provide swifter and surer relief from burdensome restrictions that no longer make sense.

In addition, it is critically important that the Commission drop its proposed regulations of set-top boxes and video apps. If adopted, such regulations would significantly damage the market values of video programming content and voluntary market arrangements by undermining copyrights and contract rights.

No market problem exists that would provide a justification for the intrusive tech mandates on video devices and video apps the Commission now contemplates. The Commission should no longer disregard the heavy costs that would initially be paid by MVPDs as well as video programming owners – and which ultimately will be paid by consumers.

It would also be a serious mistake for the Commission to design new "free" standard video apps for accessing MVPD programming. The Commission's forthcoming revised proposal would, if adopted, give the government ultimate control over the design and functions of the apps. It would also mandate the terms and conditions under which copyrighted programming must be made available. This is a compulsory license, even if Chairman Wheeler prefers not to utter the words "compulsory license." This is a legally dubious approach under Section 629. That provision is directed to Commission regulation of "converter boxes" and "equipment," not

Internet software apps. It is also contrary to copyright law and the exclusive rights of video programmers to license their content for performance or display by parties of their own choosing.

The Commission should drop its proposal and, instead, finally recognize that new market entrants and rivalrous platforms have made the device market "fully competitive." Indeed, the Commission should sunset its set-top box rules.

In sum, the Commission, finally, should bring its regulatory policies into closer alignment with the actual state of competition in the video services market. That begins with recognizing that the MVPD market is effectively competitive and with respecting First Amendment free speech principles. It also includes recognizing OVD services as a potential substitute for MVPD services. And, in all events, the Commission should drop its unlawful and harmful proposed regulations for video devices and video apps.

II. The Video Services Market Is Effectively Competitive

Data contained in the *Seventeenth Video Competition Report* (2016),[1] as well as more recent data, provide clear and convincing evidence that there is effective competition in the video market. In particular, the Commission should declare in its *Report* that there is effective competition in the national MVPD market.

The *Seventeenth Report* indicates that in 2014, direct broadcast satellite (DBS) providers' market share of MVPD subscribers rose to 33.8%. "Telco" MVPDs increased their market share to 13% and their nationwide footprint grew by 5%. Broadband service providers such as Google Fiber also expanded their footprints. Meanwhile, cable operators' market share fell again – to 52.8% of MVPD subscribers.

[1] Annual Assessment of the Status of Competition, *Seventeenth Report* ("*Seventeenth Video Competition Report*"), MB Docket No. 15-158 (rel. May 6, 2016), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0509/DA-16-510A1.pdf.

Additionally, the *Seventeenth Report* clearly identified the increasing popularity of online video distributor (OVD) services. Numbers publicized since the report's release indicate that Netflix now has 47 million or more subscribers in the U.S., Amazon Prime has close to 60 million, and Hulu has close to 12 million.[2]

Data and analysis in the *Seventeenth Report* revealed the potency of OVD competition with MVPD services. An estimated 7.8% of households watched TV programs or movies via OVDs rather than MVPDs.[3] About 150,000 MVPD subscribers terminated their service in the third quarter of 2014 – and 190,000 eliminated their service in the third quarter of 2015.[4] In fact, 2014 was the second year in which overall MVPD subscriptions declined. Cable MVPD subscriptions dropped from 55.1 million to 53.7 million households.[5] (News accounts from 2016 indicate cable subscription losses of even greater magnitude.[6]) And nearly 15% of surveyed adult broadband and MVPD subscribers indicated they were likely to cancel their MVPD service.[7] Among households that maintained MVPD service, 15% decreased their level of service.[8] The *Seventeenth Report* noted that MVPDs began offering "skinny bundles" of video channels and

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[2] *See* Piper Jaffray Companies, Press Release: "More Denim, Beauty and Video Games; Less Time in Broadcast Media, According to Survey of 6,500 Teens," *BusinessWire* (Apr. 13, 2016), available at: http://www.piperjaffray.com/2col.aspx?id=178&releaseid=2156896; Adam Levy, "How Netflix Will Get to 90 Million U.S. Subscribers," *The Motley Fool* (Aug. 29, 2016), available at: http://www.fool.com/investing/2016/08/29/how-netflix-will-get-to-90-million-us-subscribers.aspx; Hulu, Press Release: "Hulu Goes Bigger and Bolder at 2016 Upfront Presentation, Unveils +30% Growth in Subscribes, New Programming Deals and Ad Partnerships (May 4, 2016), available at: http://www.hulu.com/press/posts/hulu-goes-bigger-and-bolder-at-2016-upfront-presentation-unveils-30-growth-in-subscribers-new-programming-deals-and-ad-partnerships-a19b7c82-b70c-4e5c-a3de-3bb80b143694.

[3] *Seventeenth Report*, at 86, ¶ 197 (internal cite omitted).

[4] *Seventeenth Report*, at 86, ¶ 197 (internal cite omitted).

[5] *Seventeenth Report*, at 31 (Table III.A.5) (internal cite omitted).

[6] *See, e.g.*, David Katzmaier, CNET (Aug. 16, 2016), available at: https://www.cnet.com/news/pay-tv-providers-post-record-subscriber-losses/.

[7] *Seventeenth Report*, at 86, ¶ 198 (internal cite omitted).

[8] *Seventeenth Report*, at 86, ¶ 198 (internal cite omitted).

reduced rates "[i]n response to competition from OVDs, stagnant household incomes, and higher programming costs."[9]

The *Seventeenth Report* also highlighted advancements in video device options currently available to consumers. There is a proliferation of IP device viewing choices. On average, U.S. households with broadband connections used 7.3 Internet devices for video, including game consoles such as the Xbox One and Playstation 4, streaming media devices like Roku and TiVo, Internet-connected televisions and Blu-ray players, and home computers.[10] Mobile device viewing also grew in popularity. As the *Seventeenth Report* observed, smartphones and tablets "typically have high resolution screens for consumers to watch video" and increasing screen sizes are "making those phones more practical for watching high-resolution video" enabled by 4G LTE mobile networks.[11]

The video market's dynamism is also revealed though the growing variety of innovative video device options offered to consumers by MVPDs. IP-based, HD-capable set-top boxes, multi-room DVRs with home networking solutions, cloud-based interfaces, mobile viewing applications, gaming console viewing compatibility, portable media players, Internet-connected smartphones and tablet devices are among features that are available to consumers of MVPD services.

Moreover, the Commission should avoid repeating the *Seventeenth Report*'s mistake in effectively omitting mention of the different video device offerings by competing MVPDs. Cable, DBS, and telco MVPDs offer consumers devices that are unique to their own video networks. The *Seventeenth Report* neglected to mention the availability of Comcast X1 DVR set-top box, DIRECTV's HR 44 Genie Server, and Charter's Worldbox, among other choices.

[9] *Seventeenth Report*, at 24, ¶ 59.
[10] *Seventeenth Report*, at 80, ¶ 186 (internal cite omitted).
[11] *Seventeenth Report*, at 99-100, ¶ 225.

Although the *Seventeenth Report* highlighted the TiVo BOLT, it downplayed the reality that cable subscribers can purchase and use that device or other CableCARD-enabled third-party video devices for viewing cable MVPD services. To its credit, the *Seventeenth Report* did acknowledge Comcast's announcement of its partnership with Roku for making its Xfinity video service available to interested subscribers exclusively through video apps on Roku devices.[12] Inclusion of these options in the upcoming report's analysis is essential to providing an accurate picture of the market's competitiveness.

The Commission should recognize the prevalence of consumer choice and competition in the video marketplace. In the forthcoming *Eighteenth Video Competition Report*, the Commission should finally acknowledge that the state of the overall video service market – including the nationwide market for MVPD services – is effectively competitive.

III. Effective Competition in the Video Services Market Should Prompt the Commission to Remove Legacy Video Regulations or Reorient Them in a Deregulatory Direction Reduction

There is a glaring disconnect between the effectively competitive state of today's video market and the legacy video regulatory apparatus that remains in place. Analog-era regulations designed with the early 1990s market and technological assumptions in mind are now being applied to the dramatically changed and technologically convergent, IP-based digital video market. Regulatory restrictions of competitive markets – including legacy regulations still applied to today's video market – are unjustifiable and impose compliance costs. Legacy video regulation offers little to no discernible benefit in today's competitive video market, and it threatens to hamper innovation and increase prices charged to consumers.

The Commission should build on its *Effective Competition Order* (2015) and its Program Access Order (2011) by seeking ways to update its rules to reflect the current MVPD

[12] *Seventeenth Report*, at 95, ¶ 217.

marketplace.[13] The *Effective Competition Order* is a welcome example of the Commission readjusting its outdated policy to better fit today's competitive market conditions. In that order, the Commission readjusted legacy local cable rate and equipment regulations "for the first time in over 20 years, to reflect the current MVPD marketplace, reduce the regulatory burdens on all cable operators, especially cable operators, especially small operators, and more efficiently allocate the Commission's resources."[14] Wisely, the Commission reversed its pro-regulatory presumption that local cable markets can be rate regulated for lack of effective competition. The *Effective Competition Order* provided for a deregulatory presumption that requires production of actual evidence in order to justify such regulation.

The *Program Access Order* is another helpful example of the Commission re-aligning its legacy rules to the dynamic video market conditions. In that order, the Commission replaced its ban on exclusive contracts by vertically-integrated cable programmers with a rebuttable presumption of market competitiveness – although subject to certain qualifications.

The Commission should build on the approach taken in both orders by employing a more straightforward deregulatory presumption to apply to all video services. Such a presumption could be overcome where clear and convincing evidence is presented that potential or actual market power or consumer harm exists concerning video services.

IV. First Amendment Concerns Posed by Legacy Regulatory Restrictions on Effectively Competitive Video Services Should Prompt the Commission to Remove Them or Reorient Them in a Deregulatory Direction

Readjustment of the Commission's video policy to match video market reality is also compelled by First Amendment considerations. Commission acknowledgment in its *Effective*

[13] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Sixteenth Report, MB Docket No. 14-16 (rel. Apr. 2, 2015); Revision of the Commission's Program Access Rules, *Report and Order and Further Notice of Proposed Rulemaking* ("*Program Access Order*"), 27 FCC Rcd. 12619-37 (2010).
[14] Amendment to the Commission's Rules Concerning Effective Competition, Report and Order ("*Effective Competition Order*"), MB Docket No. 15-53 (rel. June 3, 2015).

Competition Order that the MVPD market is effectively competitive undermines the rationale for many early 1990s regulatory restrictions on free speech by MVPDs.

A number of legacy video regulations restrict editorial free speech rights concerning video content. For example, must-carry regulations require MVPDs to carry broadcast TV content not of their own choosing. MVPDs' editorial decision-making is thereby curtailed in choosing channel lineups and arranging channel tiers. Must-buy provisions requiring MVPDs to carry local broadcast stations on its basic programming tier – which it must provide to all subscribers before offering premium tiers – also curtails MVPD free speech rights concerning content selection. Program carriage regulations intended to protect video programmers unaffiliated with MVPDs from "discrimination" substitute bureaucratic mandates on program channel selection and lineup placement for MVPDs' editorial discretion. Also, "leased access" regulations, which require MVPDs to offer channel capacity to third parties at government-set rates, deprive MVPDs of editorial control over their leased channels.

U.S. Supreme Court and lower court opinions acknowledge the First Amendment rights of MVPDs in editorial decisions about video programming content.[15] Many restrictions on MVPDs' First Amendment rights – including must-carry/retransmission consent, must-buy basic tier requirements, program carriage, and leased access – were deemed permissible by courts because of the presumed existence of monopoly-like conditions in cable markets.[16]

Given the presence of effective competition between MVPDs, OVDs, as well as wireless options, such intrusive restrictions on free speech can no longer be justified. Given the absence of identifiable market power concerns and perceivable distributional bottlenecks, First Amendment free speech concerns should spur the Commission to eliminate regulations where it

[15] *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *Time Warner Cable v. FCC*, 667 F.3d 630 (5th Cir. 2012).
[16] *See, e.g., Turner*, 512 U.S. 622.

has the power to do so. As a first step, the Commission should follow through with its pending proposal to remove broadcasting exclusivity rules and instead allow contractual relationships to govern matters between MVPDs and providers of broadcast TV.[17] The Commission took a similar approach in eliminating the sports blackout rule.[18] And it should build on that precedent.

Where Congressional action is required to remove legacy video regulations, the Commission should readjust its legacy regulations by placing them on a presumptively deregulatory footing. The Commission should limit its intervention in the video market to instances where there is a compelling government interest and where any resulting burdens on protected speech rights are limited. Regulation that touches on MVPDs free speech rights should use the least restrictive means.

V. The Commission Should Analyze OVD Services as Substitutes for MVPD Services

For its upcoming *Eighteenth Video Competition Report*, it is time the Commission finally begin taking OVD services seriously as substitutes for MVPD services. In the *AT&T/DirecTV Order* (2015), the Commission expressed ambivalence in this regard. On the one hand, it acknowledged that "for most consumers today, OVD services are not substitutes for MVPD services."[19] But on the other hand, the Commission "acknowledge[d] that OVDs have the potential to become substitutes for MVPD services with a market presence that is sufficient to counter effectively an increase in price or decrease in quality by the combined entity."[20]

Survey data regarding consumers who have dropped MVPD services in favor of OVD services provides strong indicators of OVDs are increasingly perceived by consumers as close

[17] *See* Amendment of the Commission's Rules Related to Retransmission Consent, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 10-71 (March 31, 2014).
[18] Sports Blackout Rules, Report and Order, MB Docket No. 12-3 (Sept. 30, 2014).
[19] Applications of AT&T Inc. and DIRECTV For Consent to Assign Transfer Control of Licenses and Authorizations, Memorandum Report and Order ("*AT&T/DirecTV Order*"), MB Docket No. 14-90, at 30, ¶ 68 (rel. July 28, 2015).
[20] *Id*. at 30, ¶ 68.

substitutes. Additional indicators include the rising number of OVD services and content available via Internet streaming, the increasing number of OVD subscribers, the stronger preferences for OVD services among younger consumers, and growing financial investment by OVDs in original video programming. Indeed, the *Seventeenth Report* – just like its predecessor – showed an actual overall decrease in MVPD subscriptions over the prior report period, while OVD subscriptions climbed. And news accounts continue to demonstrate the seriousness with which investors take present and future MVPD subscriber losses.[21]

OVD substitution should not be dismissed by invoking unduly narrow product definitions or constrained conceptions about competition. Price competition between MVPDs and OVDs is by no means the only mode of competition. Quality enhancements and innovative offerings also benefit consumers. MVPDs continue to offer service upgrades, including mobility viewing options, time-shifting capabilities, and more channels, with Ultra-HD video in the pipeline. Thus, any price analysis must also be a factor in innovation and additional value offered by MVPDs. Nor should the Commission overlook the MVPD market's susceptibility to the "innovator's dilemma," whereby value-conscious consumers of established services are enticed away by simpler, more cost-effective OVD options.

VI. The Commission Should Not Impose Its Unlawful and Harmful Proposal to Impose New Regulations and Compulsory Licensing on Video Devices or Video Applications

It is critically important that the Commission drop its proposed regulations of set-top boxes and video apps. If adopted, such regulations would significantly damage the market values of video programming content and voluntary market arrangements by undermining copyrights and contract rights. The dynamism of the video market would be replaced with bureaucratic

[21] *See, e.g.*, Gerry Smith and Michaela Ross, "Cable Channel Subscriber Losses Have Investors Bracing for Worst," *Bloomberg* (Feb. 10, 2016), available at: http://www.bloomberg.com/news/articles/2016-02-10/media-investors-on-edge-as-cable-networks-cite-subscriber-losses.

decision-making.

No market problem exists that would provide justification for the intrusive tech mandates on video devices and video apps – as the Commission now contemplates. The Commission has pursued new regulation in disregard of the heavy costs that would initially be paid by MVPDs as well as video programming owners – and which will ultimately be paid by consumers. It is also highly doubtful that any conceivable benefits from stringent new regulations would outweigh the costs. And the Commission has undertaken no cost-benefit analysis that would even purportedly show otherwise.

Public comments filed in that proceeding – including comments and reply comments by the Free State Foundation – have articulated a variety of serious problems with the Commission's Notice of Proposed Rulemaking.[22] More recently, the Copyright Office has convincingly explained the ways in which the Commission's proposal is contrary to copyright law and the rights of video programming owners. In particular, the Copyright Office declared that the Commission's proposed rules "appear to inappropriately restrict copyright owners' exclusive right to *authorize parties of their choosing* to publicly perform, display, reproduce and distribute their works according to agreed conditions, and to seek remuneration for additional uses of their works."[23]

Also extremely problematic is the Commission's forthcoming revised proposal for an intrusive new regulatory regime under which the government will design new "free" standard video apps for accessing MVPD programming. Such a proposal would, if adopted, give the

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[22] *See* Comments of the Free State Foundation, Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42, CS Docket 97-80 (Apr. 22, 2016), available at: https://ecfsapi.fcc.gov/file/60001688291.pdf; Reply Comments of the Free State Foundation, MB Docket No. 16-42, CS Docket 97-80 (May 23, 2016), available at: https://ecfsapi.fcc.gov/file/60002012918.pdf; Seth L. Cooper, "Video Report Data Undermine the FCC's Rationale for New Device Regulation," *Perspectives from FSF Scholars*, Vol. 11, No. 16 (May 20, 2016) (included as Attachment A to Reply Comments), available at: https://ecfsapi.fcc.gov/file/60002012955.pdf.

[23] Maria A. Pallante, Register of Copyrights, U.S. Copyright Office, Letter to Blackburn, Butterfield, Collins, and Deutch (Aug. 3, 2016), available at: http://blackburn.house.gov/uploadedfiles/co_set-top_letter.pdf.

government ultimate control over the design and functions of the apps. It would also mandate the terms and conditions under which copyrighted programming must be made available to all under a compulsory license.

This is a legally dubious approach under Section 629. That provision is directed to Commission regulation of "converter boxes" and "equipment," not Internet software apps. The U.S. Court of Appeals for the District of Columbia Circuit decision in *EchoStar v. FCC* (2013) previously rejected Commission claims of exaggerated authority under Section 629.[24] It is unlikely that a court would find video app-making and mandating, as well as compulsory copyright licensing, to be implied within the terms of Section 629. And Commission establishment of its own compulsory licensing system poses serious legal problems of its own. Such a Commission-administered compulsory license would fail to "preserve copyright owners' exclusive right under copyright law to authorize… the ways in which their works are made available in the marketplace."[25]

The Commission should drop its proposal for regulating video devices and video apps and close the proceeding. Instead, it should finally begin work to eliminate set-top box rules.

When the Commission first implemented Section 629 in 1998, the Commission found that local markets for the delivery of video programming were still highly concentrated and permitted exercise of market power by incumbent cable systems.[26] Section 629 includes a sunset mechanism whereby the regulations adopted "shall cease to apply when the Commission determines that: (1) the market for the multichannel video programming distributors is fully competitive; (2) the market for converter boxes, and interactive communications equipment, used in conjunction with that service is fully competitive; and (3) elimination of the regulations

[24] 704 F.3d 992 (D.C. Cir. 2013).
[25] Pallante, Letter, *supra*.
[26] 47 U.S.C. § 549 (1996), as amended.

would promote competition and the public interest."[27]

In light of existing consumer choice of services and devices for accessing IP-based and Internet-accessible video programming, it is clear that the video device market is not an area where the Commission should be so intrusively involved. Data cited earlier regarding OVD subscribership and substitution bolsters this conclusion. The competitive status of today's video marketplace and corresponding consumer behavior trends warrant dismantling of all analog-era regulations premised on anti-competitive, monopolistic conditions that no longer exist. There is ample evidentiary basis for the Commission to declare the market for video devices "fully competitive" and to sunset its Section 629 regulations immediately or on a set-timetable.

At the very least, the Commission could commence a proceeding to establish an interpretive standard for what constitutes a "fully competitive" market under Section 629. The Commission could subsequently apply that standard to the video device market. A "fully competitive" market could be found when there is no evidence of actual or potential market power or consumer harm.

VII. Conclusion

For the foregoing reasons, the Commission should declare that the MVPD nationwide market is effectively competitive and act in accordance with the views expressed herein.

Respectfully submitted,

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[27] 47 U.S.C. § 549(e).

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August 21, 2016